

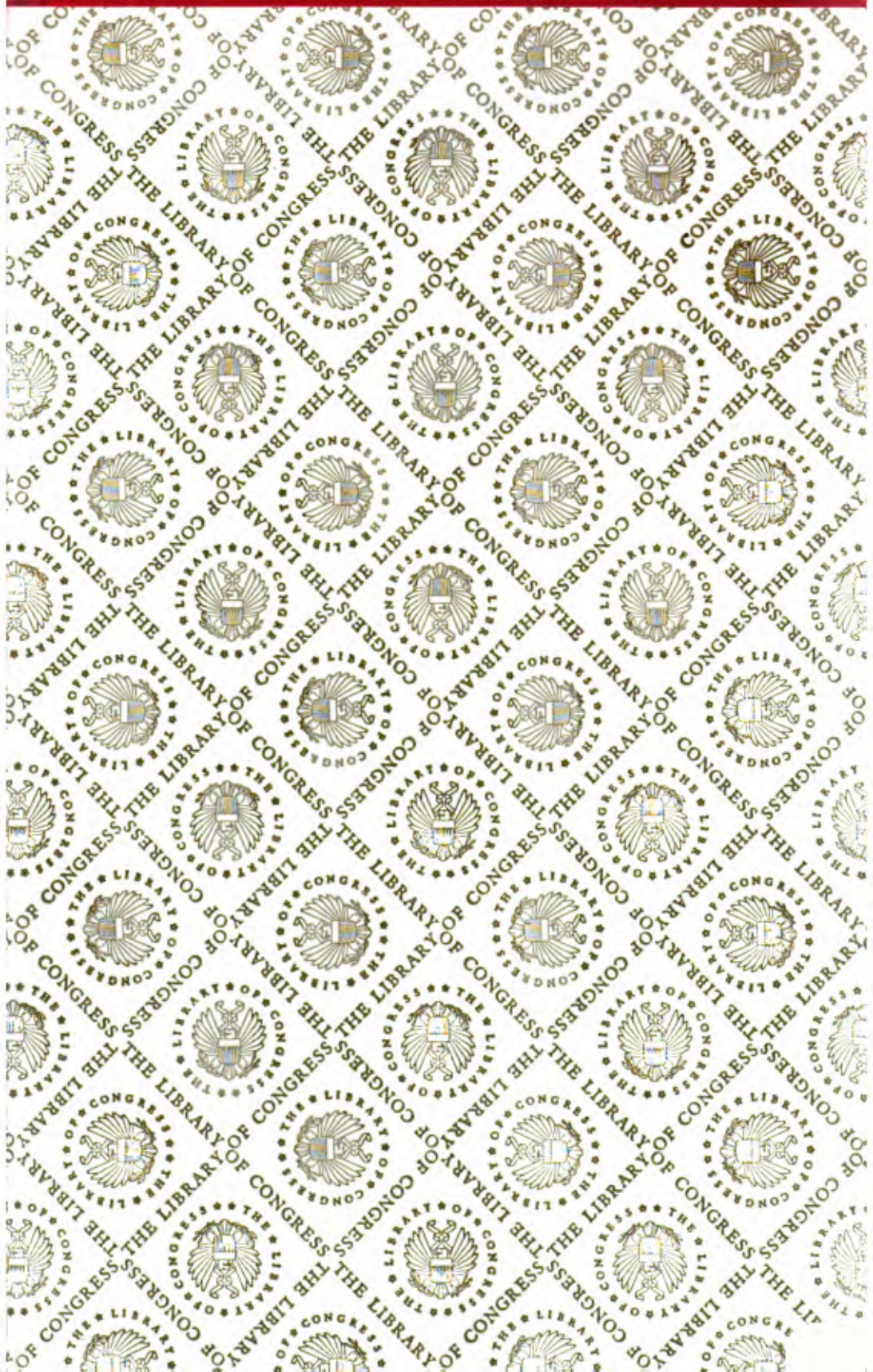
KF 27

.J832

1991e

Copy 2





PRESIDENTIAL WAIVER AUTHORITY OF CONFLICT OF INTEREST STATUTES

12614
12

MAY 12 1992
HEARING

BEFORE THE

**SUBCOMMITTEE ON ADMINISTRATIVE LAW
AND GOVERNMENTAL RELATIONS**

OF THE

**COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES**

ONE HUNDRED SECOND CONGRESS

FIRST SESSION

ON

H.R. 3381

**PRESIDENTIAL WAIVER AUTHORITY OF CONFLICT OF INTEREST
STATUTES**

OCTOBER 3, 1991

Serial No. 38



Printed for the use of the Committee on the Judiciary

U.S. GOVERNMENT PRINTING OFFICE

WASHINGTON : 1992

52-892 z-3

For sale by the U.S. Government Printing Office
Superintendent of Documents, Congressional Sales Office, Washington, DC 20402

ISBN 0-16-038386-2

COMMITTEE ON THE JUDICIARY

JACK BROOKS, *Texas, Chairman*

DON EDWARDS, California	HAMILTON FISH, JR., New York
JOHN CONYERS, JR., Michigan	CARLOS J. MOORHEAD, California
ROMANO L. MAZZOLI, Kentucky	HENRY J. HYDE, Illinois
WILLIAM J. HUGHES, New Jersey	F. JAMES SENSENBRENNER, JR., Wisconsin
MIKE SYNAR, Oklahoma	BILL MCCOLLUM, Florida
PATRICIA SCHROEDER, Colorado	GEORGE W. GEKAS, Pennsylvania
DAN GLICKMAN, Kansas	HOWARD COBLE, North Carolina
BARNEY FRANK, Massachusetts	D. FRENCH SLAUGHTER, JR., Virginia
CHARLES E. SCHUMER, New York	LAMAR S. SMITH, Texas
EDWARD F. FEIGHAN, Ohio	CRAIG T. JAMES, Florida
HOWARD L. BERMAN, California	TOM CAMPBELL, California
RICK BOUCHER, Virginia	STEVEN SCHIFF, New Mexico
HARLEY O. STAGGERS, JR., West Virginia	JIM RAMSTAD, Minnesota
JOHN BRYANT, Texas	
MEL LEVINE, California	
GEORGE E. SANGMEISTER, Illinois	
CRAIG A. WASHINGTON, Texas	
PETER HOAGLAND, Nebraska	
MICHAEL J. KOPETSKI, Oregon	
JACK REED, Rhode Island	

JONATHAN R. YAROWSKY, *General Counsel*
ROBERT H. BRINK, *Deputy General Counsel*
ALAN F. COFFEY, JR., *Minority Chief Counsel*

SUBCOMMITTEE ON ADMINISTRATIVE LAW AND GOVERNMENTAL RELATIONS

BARNEY FRANK, *Massachusetts, Chairman*

DON EDWARDS, California	GEORGE W. GEKAS, Pennsylvania
ROMANO L. MAZZOLI, Kentucky	STEVEN SCHIFF, New Mexico
HARLEY O. STAGGERS, JR., West Virginia	JIM RAMSTAD, Minnesota
JACK REED, Rhode Island	

PAUL J. DROLET, *Counsel*
ROY A. DYE, *Legislative Specialist*
DAVID A. NAIMON, *Assistant Counsel*
RAYMOND V. SMIETANKA, *Minority Counsel*

KF 27
J832
1991e
Copy 2

CONTENTS

HEARING DATE

October 3, 1991	Page 1
-----------------------	-----------

TEXT OF BILL

H.R. 3381.....	2
----------------	---

WITNESSES

Campbell, Donald E., Deputy Director, Office of Government Ethics, accompanied by Jane S. Ley, Deputy General Counsel	5
Fygi, Eric J., Deputy General Counsel, Department of Energy	10
McBride, Ann, senior vice president, Common Cause	23

LETTERS, STATEMENTS, ETC., SUBMITTED FOR THE HEARING

Campbell, Donald E., Deputy Director, Office of Government Ethics: Prepared statement	6
Fygi, Eric J., Deputy General Counsel, Department of Energy: Prepared statement	12
McBride, Ann, senior vice president, Common Cause: Prepared statement	25

APPENDIXES

Appendix 1.—Letter to Chairman Barney Frank from Common Cause, dated October 11, 1991	33
Appendix 2.—Letter to Chairman Barney Frank from the Secretary of Energy, dated October 23, 1991	38

PRESIDENTIAL WAIVER AUTHORITY OF CONFLICT OF INTEREST STATUTES

THURSDAY, OCTOBER 3, 1991

**HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON ADMINISTRATIVE LAW
AND GOVERNMENTAL RELATIONS,
COMMITTEE ON THE JUDICIARY,
*Washington, DC.***

The subcommittee met, pursuant to notice, at 11 a.m., in room 2226, Rayburn House Office Building, Hon. Barney Frank (chairman of the subcommittee) presiding.

Present: Representatives Barney Frank, Don Edwards, Romano L. Mazzoli, Jack Reed, George W. Gekas, Steven Schiff, and Jim Ramstad.

Also present: Paul J. Drolet, counsel; Roy A. Dye, legislative specialist; David A. Naimon, assistant counsel; Cynthia Blackston, secretary; and Raymond V. Smietanka, minority counsel.

Mr. FRANK. The subcommittee will come to order.

[The bill, H.R. 3381, follows:]

102^D CONGRESS
1ST SESSION

H. R. 3381

To amend section 202 title 18, United States Code, to allow the President to waive certain conflict of interest statutes with respect to certain individuals.

IN THE HOUSE OF REPRESENTATIVES

SEPTEMBER 24, 1991

Mr. FRANK introduced the following bill; which was referred to the Committee on the Judiciary

A BILL

To amend section 202 title 18, United States Code, to allow the President to waive certain conflict of interest statutes with respect to certain individuals.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*
3 **SECTION 1. WAIVER AUTHORITY.**

4 Section 202 of title 18, United States Code, is
5 amended by adding after subsection (e) the following new
6 subsection:

7 “(f)(1) The President may grant a waiver of any re-
8 striction imposed by section 203, 205, 207, 208, or 209
9 to any individual if the President determines and certifies
10 in writing that, in order to deal with an emergency that

1 threatens public health or safety, national security, or na-
2 tional defense preparedness—

3 “(A) it is in the public interest to grant the
4 waiver;

5 “(B) the services of the individual are critically
6 needed for the benefit of the Federal Government;
7 and

8 “(C) the need for the services of the individual
9 outweighs the potential for a conflict of interest.

10 “(2) Except in the case of section 207, a waiver
11 granted under paragraph (1) shall be in effect for a period
12 of not more than 90 days. The President may renew the
13 waiver for additional periods of not more than 90 days
14 each if, in the case of each such renewal, he certifies in
15 writing that the requirements set forth in paragraph (1)
16 for initially granting the waiver continue to be met.

17 “(3) A copy of each certification made under this sub-
18 section shall be transmitted to the Director of the Office
19 of Government Ethics, unless the President determines
20 that public availability of such certification would jeopard-
21 ize national security. The Director shall make a copy of
22 such certification available to the public pursuant to the
23 procedures set forth in section 105 of the Ethics in Gov-
24 ernment Act of 1978. In making such certification avail-
25 able, the Director may withhold from disclosure any infor-

1 mation contained in the certification that would be exempt
2 from disclosure under section 552 of title 5.

3 “(4) The President may not delegate the waiver au-
4 thority provided under this subsection.”.

5 **SEC. 2. REPEAL.**

6 Subsection (k) of section 207 of title 18, United
7 States Code, is repealed.

O

Mr. FRANK. The hearing on the waiver bill will start. Why don't you come on up and give us your testimony, Mr. Campbell. We have two members and that's enough to take testimony.

Without objection, your statement will be made a part of the record. This has to do with Presidential waiver authority of the conflict of interest laws that has already been considered by another committee. We asked them to drop it because of jurisdictional problems.

Why don't you make a very quick statement.

**STATEMENT OF DONALD E. CAMPBELL, DEPUTY DIRECTOR,
OFFICE OF GOVERNMENT ETHICS, ACCOMPANIED BY JANE S.
LEY, DEPUTY GENERAL COUNSEL**

Mr. CAMPBELL. Thank you, Mr. Chairman.

I just have some very brief comments, and then Jane Ley and I will be glad to answer any questions.

The Office of Government Ethics strongly supports the thrust of the bill giving the President authority to waive the application of any portion of or all of the proscriptions found to the conflict of interest provisions of sections 203—

Mr. FRANK. Good. You have submitted a written statement for the record, correct?

Mr. CAMPBELL. Yes, sir.

[The prepared statement of Mr. Campbell follows:]

FOR RELEASE ON DELIVERY
Expected at 10:00 AM EDT
October 3, 1991

STATEMENT OF

DONALD E. CAMPBELL
DEPUTY DIRECTOR
OFFICE OF GOVERNMENT ETHICS

BEFORE

THE SUBCOMMITTEE ON ADMINISTRATIVE LAW
AND GOVERNMENT RELATIONS OF
THE HOUSE JUDICIARY COMMITTEE

ON

A NATIONAL INTEREST WAIVER FOR THE
CONFLICT OF INTEREST STATUTES

MR. CHAIRMAN AND MEMBERS OF THE COMMITTEE:

I am pleased to be here to testify today on legislation that would provide the President with authority to waive the application of any portion of or all of the proscriptions found to the conflict of interest provisions of Sections 203, 205, 207, 208, or 209 of title 18, United States Code. The authority would be available when he finds that in order to address certain emergency situations, such waivers are in the national interest. As you know, my Office submitted a legislative proposal for that same purpose earlier this year and the Administration strongly supports such waiver authority.

The Office of Government Ethics has long felt that there should be authority in the conflict of interest statutes found in ch. 11 of title 18, United States Code for national interest waivers. This is particularly true of section 208. At present, sections 203 and 205 have national interest waiver authority available only for certain special Government employees for limited purposes. The rest have no such authority. While the proscriptions in all of these statutes are intended to protect governmental processes under normal conditions, we recognize that there can be unforeseen emergencies where services are needed quickly from employees in areas not normally a part of their responsibilities and from members of the public from whom specialized expertise is needed quickly.

These statutes are not designed to accommodate such emergency situations with much flexibility. We became acutely aware of that fact earlier this year during the pendency of Operation Desert Storm when we focused on the uncertainties of the full needs of the Government to carry out that Operation as well as to address potential terroristic activities within the United States. That experience made us recognize that such authority must exist, and must exist in a manner that is not developed in a piecemeal fashion, spread throughout a number of separate statutes dealing with separate programs. Our experience with those attempts have shown them to be woefully inadequate for the Government's interest as a whole.

Consequently, we set about developing a proposal that, if enacted, would provide that authority. In emergency situations, regular employees and private citizens called upon to assist the Government could then be assured that their services in well-defined matters would not place them in jeopardy of violating these criminal conflict of interest statutes. To ensure that the authority was sufficiently broad to address any situation yet carefully tailored through the inclusion of procedures designed to prevent even the appearance of misuse of the authority, we felt and continue to feel that the following elements should be included:

- o The waiver authority would rest solely with the President.
- o A waiver would be issued for purposes of national security, national defense preparedness, or the health and safety of the people of the United States.
- o The waiver could be issued to an individual or a group of individuals depending upon the nature of the emergency and would be available to any individual covered by the statutes including employees of all three branches and members of the public providing services or compensation covered by the specified sections.
- o The waiver could address the application of any part of one or all of the specified sections.
- o The test to be applied is that the need for an individual's or individuals' services on a matter or matters outweighs the potential for a conflict of interest.
- o Except for those waivers that contain information that would jeopardize national security, the President would transmit

copies to the Office of Government Ethics. The Office would make them available in the same manner as public financial disclosure statements. However, information in the waivers exempt from disclosure under section 552 of title 5, could be withheld by the Director. The Department of Justice would, of course, have access to all such waivers.

In reviewing the bill which you have introduced, we note that most of those concepts are included along with a time limitation. We would prefer that no time limitation be specified in the statute so that the President can tailor the waiver to the circumstances of the emergency and to specify in his written determination an appropriate period of validity. If a statutory time limitation is deemed necessary, we would suggest that it be lengthened to six months or a year with an opportunity for renewal.

A much more important issue, however . . . is the requirement that the waivers be given individually in all cases, rather than providing for the opportunity for the President to grant such waivers to defined groups of people. If I may, I would like to address that concern more specifically.

We all hope that the United States does not find itself in the situation where an emergency arises of a magnitude requiring any significant use of this authority. However, if it does, we believe that such a situation may require immediate action on the part of private sector individuals who are willing to assist in the emergency as well as Government employees detailed from one job to another. In order to encourage such service, protection from possible criminal sanctions should be in place when the individuals begin their service. Realistically, to require the actual name of each of those individuals for a waiver from the President would defeat the purpose of being able to address a large scale emergency with any speed. We certainly do not believe that it is advisable to issue waivers after the services of the individuals have been rendered.

On the other hand, we envision that waivers for groups of individuals would be crafted so as to specify the authority under which a group of individuals were called to assist, the duties they were expected to perform and the circumstances under which they could perform those duties without fear of being charged with a violation of any one of those statutes. Those waivers could be issued quickly by the President and could define the class of individuals covered and the activities in which they would be allowed to engage without fear of criminal liability. Initial knowledge of the individuals' names would not be necessary.

For instance, if because of an emergency, a national defense executive reserve unit were activated, the President could issue a waiver indicating that the waiver would apply to any individual activated under that authority, that any individual so activated would be subject only to sections 203 and 205 as if they were special government employees who never served over 60 days, would be subject only to section 208 on matters specifically involving a contract for themselves, spouses, or minor children or their employers, would not be subject to section 209 regardless of the number of days served under that emergency appointment, and would be subject only to section 207(a). In that way, the waiver could be tailored to the duties of those individuals as well as the needs of the government and its desire to protect the most basic governmental processes. The individuals could easily be identified if any question arose later.

The same would be true for regular government employees placed on emergency detail from one agency to another. For instance, the waiver could be issued for all full-time government employees placed on detail to support the emergency response and that during a specified period not to exceed a specified number of days, any security interest in a publicly traded company would not disqualify them from acting on any matter in which they were required to act as a result of this detail. There would generally be no reason to waive the application of any of the other statutes for full-time government employees and only limited additional waiver needs for part-time, non special Government employees.

Ultimately, if a large-scale emergency exists, we expect that the President will have much more important matters to address than the issuance of individual waivers for people who are critically needed to address that matter. Again we hope that authority may never be required, but we believe that flexibility is critical and that authority for waivers for well-defined groups is the kind of practical flexibility that is necessary.

I sincerely appreciate the Subcommittee's willingness to take up this issue and will be happy to answer any questions you might have.

Mr. FRANK. Question. As I understand it, this is in case there is an energy emergency, and this would allow people from the industry to be designated to help in this emergency but they would have to be named, is that correct, the individuals?

Mr. CAMPBELL. That's the way your bill reads, yes.

Mr. FRANK. OK.

Ms. LEY. It's not just energy emergencies, though.

Mr. FRANK. What else would it be?

Ms. LEY. National security, health, safety, national defense preparedness.

Mr. FRANK. What are these guys going to do in the case of national security?

Ms. LEY. Pardon me?

Mr. FRANK. National security—all right. It's all from the energy industry, is that right?

Mr. CAMPBELL. No.

Ms. LEY. No. It could be granted to anybody that any of those statutes apply to.

Mr. FRANK. OK. All right. Now I understand it.

Mr. Schiff, any questions?

Mr. SCHIFF. No, Mr. Chairman.

Mr. FRANK. All right. You're dismissed.

Mr. CAMPBELL. Thank you, sir.

Mr. FRANK. Is Mr. Fygi here from the Department of Energy? Why don't you come forward.

Without objection, we will make your statement a part of the record.

STATEMENT OF ERIC J. FYGI, DEPUTY GENERAL COUNSEL, DEPARTMENT OF ENERGY

Mr. FYGI. Thank you, Mr. Chairman.

Mr. FRANK. You see, we need two to have a hearing and three to have a markup. So we'll do the hearing first.

Mr. FYGI. Thank you. I want to make a couple of brief points here that build upon your last observation.

Mr. FRANK. Go ahead.

Mr. FYGI. First, the administration bill is not confined to the energy industry. However, some of our recent experiences during last year's and earlier this year's emergencies in the Middle East gave us some practical experience of the need for resuscitating some type of authority under which emergency waivers of certain of the conflict of interest restrictions could occur. That is what the administration's bill is directed to.

As is indicated in our prepared statement, in our experience earlier this year, the Energy Secretary simply was unable to bring to bear the resources contemplated to be available to the Government by the Defense Production Act because of the interdiction of conflict of interest waiver authority that had been included in that statute in 1950 and which had fallen out of it in 1962.

The administration's bill would, among other purposes, provide a different means for filling in that lost piece of authority, which would enable the Government once again to bring to bear the

kinds of expertise from any industry, including the petroleum industry, that can be very useful in an emergency.

We found, for example, in the Desert Storm operation, that kind of expertise was necessary and invaluable in unpredictable circumstances, even ranging to target selection aiding the military enterprise. This illustrates that one thing to bear in mind in any emergency bill is the need that it be sufficiently flexible to accommodate unpredicted uses of the kinds of industrial expertise that the Defense Production Act originally authorized in 1950.

Finally, there is one other observation that I think I can summarize from our prepared statement. The bill that was included in your invitation to Admiral Watkins in draft form, and which since has been introduced, would also include an extraneous repeal of 18 U.S.C. 207(k). The Energy Department believes that, first, the subject matter of the statute that would be repealed has nothing to do with emergency authorities and, therefore, we would object to its repeal. In fact, we would encourage this subcommittee to consider carefully—

Mr. FRANK. Go ahead. I can listen to two people at once.

Mr. FYGI. That's a very considerable talent.

Mr. FRANK. It's something you have to develop if you work around here.

Mr. FYGI. Sometimes the witnesses are not quite so proficient and their concentration is impeded.

We also believe that the separate subject matter of 207(k), which was designed to enable the Department to access the expertise available in the National Laboratory System, is a subject worthy of the subcommittee's separate consideration.

[The prepared statement of Mr. Fygi follows:]

PREPARED STATEMENT OF ERIC J. FYGI, DEPUTY GENERAL COUNSEL, DEPARTMENT OF
ENERGY

I am pleased to appear today in response to the invitation extended by Chairman Brooks' letter of September 16 to Secretary Watkins regarding both the Administration's proposal to provide the President waiver authority for certain of the conflict of interest statutes, and the draft bill that was enclosed with the Chairman's letter (which we understand has been introduced as H.R. 3381).

The Department emphatically supports the thrust of both of these initiatives from the perspective of their potential utility as substitutes for waiver authority that was effectively removed from the Defense Production Act in 1962. Without adequate waiver authority, certain key industrial expertise provided for by the Defense Production Act in the National Defense Executive Reserve Program has not been available in past energy emergencies and will remain an unavailable and unused resource in the event of future energy emergencies. For example, such expertise was neither available to the Government during the Arab Oil Embargo of 1973 nor in the military campaign earlier this year to eject Iraqi forces from their forcible occupation of Kuwait.

The relationship between the types of authorities now being considered by the Subcommittee and the Government's ability to deal with these types of energy-related emergencies becomes apparent from an overview of the National Defense Executive

Reserve Program established by the Defense Production Act, in particular the energy units of the Executive Reserve. From its adoption in 1950 to this day, the Defense Production Act has included an executive reserve designed to afford the Government, in times of emergency, current expertise from industry to aid the Government in its responses to those emergencies. In short, this element of the Defense Production Act called for systematic establishment of means whereby current industry expertise could be made available to the Government in times of need. This concept evolved out of the country's extensive use of industry experts in World War II, and provided a critical vehicle for utilizing industry expertise during the Korean War. At present approximately thirteen Executive departments and agencies sponsor National Defense Executive Reserve organizations composed of approximately 2,000 experienced civilian executives with special managerial, professional, and technical skills. The Executive Reserves were established by the industry sector, and since 1977 the Executive Reserve from the petroleum industry -- as well as several others -- has existed under the Department of Energy.

When Iraq invaded Kuwait in August 1990, the Energy Department undertook several efforts directed to marshalling the knowledge and resources available to the Department in order to aid in our Nation's ultimate response. An important element of this effort was directing authoritative information regarding the

petroleum production infrastructure in the theater of operations to those who could use it.

Secretary Watkins sought to deploy the Executive Reserves from the petroleum industry as the means through which to apply current expertise to the emergency at hand. This effort proved unavailing, because -- in the aftermath of the 1962 recodification of the criminal conflict of interest prohibitions -- reservists from the petroleum industry could not accept temporary assignments with the Government without fear that their personal integrity and compliance with the criminal laws would be brought into question.

The nature of the particular emergency we confronted required current information on aspects of the petroleum industry infrastructure in Kuwait. On one occasion, this type of expertise was of critical importance to the details of effective target selection.

The Secretary of Energy, without the petroleum industry executive reserves available to him, had to improvise alternate means in order to contribute information within the institutional expertise of this Department to aid the Nation's military efforts in Iraq. These steps included reliance on advice from individuals now retired from the petroleum industry, as well as some of the specialized skills that were available to the Department's National Laboratories.

The point of this recent historical observation is to indicate that there should be a better means available than improvisation and jury rigging in order to make necessary industrial expertise available to the Government in times of emergency. The Administration's bill would accomplish this by authorizing the President to make waivers from the conflict of interest laws for individuals and classes of individuals in order to deal with emergency situations. Unlike the original Defense Production Act as it was adopted in 1950, of course, the Administration's bill is not confined to the single subject matter of the National Defense Executive Reserve that was established in that statute.

I wish to emphasize the importance the Department of Energy attaches to the utility and workability of emergency waiver authorities when dealing with an actual emergency. In this respect an authority of this nature is like a fire hose within a latched cabinet. Given that the very presence of an emergency would preoccupy those who must be responsible for responding to it, the latches cannot be so complex as to deter the ability to deploy the hose and put out the fire.

In this connection, the draft bill enclosed with Chairman Brooks' letter differs from the Administration's initiative in that it would not include the Administration's proposed explicit authorization of waivers to be extended to classes of

individuals. Moreover, the draft bill also would limit the duration of any such waiver to a 90-day period, requiring renewal of any waiver in order for it to extend beyond 90 days. Like the Administration's bill, under the draft bill the President may not delegate his waiver authority, thus requiring renewed personal action by the President in any instance in which a waiver would be required to remain in effect for more than 90 days.

In our experience, the limitation of the authority to grant these waivers to the President acting personally is itself an extremely significant and effective constraint on its use. That is the approach that was reflected in the Administration's bill, after consideration of the issue whether that restriction standing alone might prove such an impediment in the actual dynamics of an actual emergency to make the authority largely illusory. Adding additional limitations not found in the Administration's proposal, such as those contained in the draft bill, tends only to risk that the authority would become so unwieldy as a practical matter to render it of little utility in an actual emergency. We respectfully suggest that the Subcommittee reflect carefully on these aspects of the legislation as it proceeds to consider it.

Finally, there is another provision of the draft bill that was not contained in the Administration's proposal that is very troubling to the Department. Section 2 of the draft bill would

repeal 18 U.S.C. 207(k), which deals with the President's authority to waive the post-employment restrictions otherwise applicable when former employees of government-owned, contractor-operated entities leave federal service to rejoin the entity from which they were recruited to serve in the Government.

This provision originated with the 1990 Defense Authorization Act (Pub. L. No. 101-189). Unlike the Administration's proposal on the executive reserve and section 1 of the draft bill, section 207(k) was not intended to deal with emergencies. Instead its object was to enable the Government, and particularly the Department of Energy, to recruit gifted scientists from the National Laboratory system to spend a portion of their professional careers in federal service without risk to their ability to resume their professional careers in the National Laboratory system after a tour of service in the Department of Energy.

The National Laboratories, as the Subcommittee may be aware, are one of the very few sources of scientific excellence in the particular applications that are most germane to the Department's nuclear weapons research, development and production complex. The ability to recruit executives from the ranks of these talented individuals was identified early in Admiral Watkins' tenure as one of the key sources of the level of excellence needed to bring the Department's complex up to the level of

performance that the American people properly can demand of it. The National Laboratories are institutions established and funded exclusively by the federal government in order to perform quintessential federal missions. It simply makes no sense to apply woodenly the same type of post-employment conflict of interest constraints proposed in the draft bill to this setting where we are, in reality, dealing with institutions whose missions, functions, and operations are fully devoted to and integrated with the Government's most important scientific and national security undertakings.

We do not suggest that the waiver authority that currently appears in 18 U.S.C. 207(k) is the ideal solution to the problems that the Secretary of Energy has encountered in this area. We do suggest, with equal emphasis as our support of the thrust of the Administration's and the draft bill's emergency authority, that repeal of section 207(k) without consideration of the public policy concerns to which it is directed would be most unwise. Instead the Department would suggest that this matter be thoroughly considered on its own merits and that the Department be afforded the opportunity to describe in greater detail the problems to which its enactment was directed. In this connection, I attach for the Subcommittee's information a copy of

correspondence to the Committee on Armed Services in which Secretary Watkins described the problems that this legislation was intended to remedy.

Mr. Chairman, this concludes my prepared statement. I will be pleased to respond to any questions that you or members of the Subcommittee may have. Thank you.



The Secretary of Energy
Washington, DC 20585

August 1, 1989

The Honorable Sam Nunn
Chairman
Committee on Armed Services
United States Senate
Washington, D. C. 20510

Dear Mr. Chairman:

When the President asked me to take on the job as Energy Secretary, he made it clear that my first and most challenging mission was to clean up the Nation's nuclear production complex.

The plain fact of the matter is that production of strategic nuclear materials can resume only with the highest confidence levels of safety and environmental compliance. Achieving this will require more than just money for bricks and mortar. The Department desperately needs an infusion of key individuals possessing superior skills and expertise in managing complex scientific and industrial activities whose operation requires the utmost in professionalism and experience.

To carry out this task the Secretary of Energy requires individuals of exceptional ability and experience in a variety of technical fields. The skills needed range from leadership and individual creative experience in the weapons program conducted by the national laboratories, to individuals possessing experience in senior management positions in industries that have had to deal with and master problems similar to those encountered by the Department's weapons complex.

My ability to attract such people has been hampered. Compensation levels in the private sector for individuals possessing the type of experience the Department needs now frequently are well into six figure ranges. For example, I am informed that the senior contractor executive at one of the Department's major facilities -- whose performance DOE must be in a position to oversee effectively -- commands in excess of \$200,000 in annual compensation. Even senior scientists at the national laboratories, whose work is

exclusively financed by the government to carry out government programs, typically are compensated at rates comfortably within six figures. For these individuals, too often it is literally impossible to accept a federal position at federal compensation levels.

It is to remedy this immediate problem that the 1991 Defense Authorization Bill contains temporary authority authorizing the Secretary of Energy to designate 25 positions supporting the Department's defense activities as critical to that program. Under this legislation, such a designation would enable the Secretary of Energy to fix the compensation for this minimum number of critical positions up to 150% of that otherwise provided by law for positions in Level II of the Executive Schedule.

As it was reported by the Armed Services Committee, the bill contains two features that are of critical importance to its effectiveness. First, during the course of its consideration by that Committee, it was determined that 25 positions were appropriate for designation by the Secretary of Energy under this legislation. From my survey of the Department's defense activities, 25 positions is a very modest complement and the minimum necessary to make this approach actually work. While I estimate that easily more than 100 positions probably could be considered critical to the Department's strategic defense missions, I believe the Committee's choice of 25 positions is the minimum necessary and that number should not be reduced.

Second, in addition to its compensation features, the bill affords certain limited conflict of interest law relief for scientists of the national laboratories who come to work for a time in critical DOE positions. The talent in the national laboratories is a critically-needed element that should be available to the Department. A period of service in DOE by a national laboratory scientist should be a logical step in a career path, and that period of service in DOE should not prejudice a laboratory scientist's future career opportunities within the national laboratory system.

Even though the national laboratories perform exclusively governmental work with government property to carry out sensitive government programs, technically they are operated by contractors, like the University of California. Thus for conflict of interest law restrictions, laboratory service both before and after

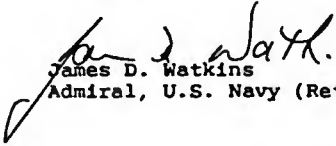
service in DOE is regarded as though it were any other employment with a private contractor. National laboratories in fact are not ordinary private contractors, however, and this legislation would provide the minimal tailoring of the existing conflict of interest laws to enable laboratory scientists to serve in critical positions in DOE without prejudicing their future careers in the national laboratory system.

In urging favorable action on this measure I am keenly aware that the President has advanced initiatives dealing government-wide with executive compensation and federal ethics law reform. As a member of the President's team, I enthusiastically share his conviction that these measures properly should be considered on a government-wide basis. Although the President's measure is not before the Senate today, I urge that his proposal for government-wide special pay authority be acted upon promptly. The pay provisions for the Department of Energy should be modified to be consistent with the President's proposals when they are enacted.

My assessment of the Armed Services Committee's formulation for critical DOE positions is that it is entirely consistent with the spirit and thrust of the President's initiatives. That formulation is directed, however, to the narrower and immediate problem of restoring the Nation's ability to produce strategic nuclear defense materials within the next year.

Thus, it is my personal view and my strong conviction that, to deal with the Department's urgent current needs, the approach adopted by the Armed Services Committee is the best way to proceed. Therefore I urge and appreciate your support for this provision.

Sincerely,


James D. Watkins
Admiral, U.S. Navy (Retired)

Mr. FRANK. Let me summarize. You don't object to the way the bill is redrafted on the subject matter that's covered, but your objection is to the other piece repealing 207(k). We can consider that.

Mr. FYGI. We're objecting to the repeal. We think it's premature. It's a whole different subject and we would like to work with you and——

Mr. FRANK. The way we deal with the principal subject, the general waiver authority is acceptable?

Mr. FYGI. The way the waiver for the emergency waiver authority——

Mr. FRANK. Is in acceptable form?

Mr. FYGI. I think it's a very significant step forward myself——

Mr. FRANK. No, no. In the form in which the bill that I introduced has it, is that acceptable to you, that form?

Mr. FYGI. The waiver authority, the emergency waiver authority——

Mr. FRANK. Right, not the post-employment.

Mr. FYGI. Right. I wouldn't say it's not acceptable. My prepared statement does point out a couple of respects in which the administration's bill is a little broader, provides a little more flexibility, and states the reasons for the subcommittee to carefully consider those values as it approaches the bill.

Mr. FRANK. I appreciate that.

Does anyone have any questions?

Mr. FYGI. If there are any, I would be happy to respond for the record.

Mr. FRANK. Thank you.

Ms. McBride is here. We will have her come forward.

STATEMENT OF ANN McBRIDE, SENIOR VICE PRESIDENT, COMMON CAUSE

Ms. McBRIDE. Thank you, Mr. Chairman. We appear to be on a fast track here, but I wanted very much to put in the views of Common Cause on the legislation.

Mr. FRANK. That's why we wanted to have you. Please go ahead. If you have a written statement, we will make it a part of the record, without objection.

Ms. McBRIDE. We recognize that there are times in a national emergency when the President should be able to call people in from the private sector. However, we just simply do not believe that a case has been made for extending this kind of emergency waiver authority. We know that in the bill you've tried to provide safeguards against abuse. We think there are additional safeguards that could be added, which we have included in our statement. But we frankly do not think a case has been made for this waiver authority.

We have just had a war in which the expertise of people was used. Things seem to have come out fine in that case. We also seem to have additional waiver authority under other laws which we think would work and can work well. Frankly, we believe, Mr. Chairman, and continue to believe, that there are people in the United States who are willing to come forward in times of real national emergencies to serve their Government, either as one-on-one

consultants giving one-on-one advice, which is one way of doing it, or through an advisory group, or through coming into Government.

We think there is appropriate waiver authority that exists in current law for those without compensation. There are specific waiver authorities under parts of these laws, like at DOE, which allows you to waive divestiture if it's an undue hardship, to waive other things if there's undue hardship or in the national—

Mr. FRANK. Ms. McBride, I appreciate that. But would you acquiesce if we recessed this hearing and called you back? I want to go on to a markup.

Ms. McBRIDE. Oh, sure.

Mr. FRANK. Thank you. The hearing is recessed.

[Whereupon, at 11:08 a.m., the subcommittee proceeded to other business.]

[The subcommittee resumed, pending other business, at 11:17 a.m.]

Mr. FRANK. We will now reconvene the hearing. Ms. McBride, please come forward. And if one member will stay here, that will be helpful because I need two to have a hearing.

Mr. SCHIFF. I will volunteer to do that, since I got the benefit of the time during the markup.

Mr. FRANK. Thank you.

Let me just say to people that we don't mean to be treating these things casually. We are not. They've been studied and we knew where the agreements were. Members have a lot of conflicting business now and it seemed to be in our interest and everybody else's interest to move expeditiously.

We can now proceed. Ms. McBride was expressing her skepticism that there's a need for this waiver authority for the conflict of interest laws. Please continue.

Ms. McBRIDE. We just think that there is a real question of whether additional waiver authority is needed in this area. We think the President obviously needs to be able to act in the national interest, and part of that national interest is to protect against conflict of interest.

This report from the National Petroleum Council, which I guess was the impetus for this legislation, talks about the need to set up these reservists, and yet, as part of their report, Mr. Chairman, they make clear that there are ways that companies can now have impact. One is on this one-on-one discussion; they may talk about an advisory group from the industry to deal with national emergencies—and this is the National Petroleum Council's own language—"such as occurred after the Iraqi invasion of Kuwait." So there are ways to get the views of corporations in.

I do not believe that during the recent war the petroleum industry was not getting views and help into the Government. We think that the waiver authority exists, and we think it can be used—if you look at the DOD regulations, a person can be waived from taking matter on an action in which he has a financial interest, if he can get a written determination that the interest is not likely to be affected by his action. It can be waived when there is a pecuniary interest in an energy concern. If there is an exceptional hardship when participating in matters in which he participated personally and substantially, conflict rules may be waived. Waiver

may also be obtained in the case of national interest. There has been on the books a waiver that you can enter Government service without compensation, that you can get a case-by-case waiver for these things.

[The prepared statement of Ms. McBride follows:]

PREPARED STATEMENT OF ANN MCBRIDE, SENIOR VICE PRESIDENT, COMMON CAUSE

Mr. Chairman, I appreciate the opportunity to present the views of Common Cause to this Subcommittee regarding H.R. 3381, proposed legislation to give the President non-delegable authority in emergency situations to waive conflict-of-interest statutes found in sections 203, 205, 207, 208 or 209 of title 18 United States Code.

Common Cause has long supported statutes intended to reduce potential conflicts of interest as well as to avoid abuse of privilege and influence gained by service in the government.

We understand that the legislation before the Subcommittee today is intended to eliminate impediments which may inhibit the President's ability to recruit individuals with unique expertise or knowledge into government service in times of national emergency. Proponents of the legislation argue that current conflict-of-interest statutes dealing with outside compensation, post-employment restrictions, financial conflicts and activities in claims against the United States impair the President's ability to find individuals in important national sectors, such as the oil industry, who are willing to come into government employment during a national emergency. These individuals are said to be unwilling to meet conflict-of-interest standards which

might require in certain cases disinvestment or which would place new and unacceptable limitations on their activities. The proponents also argue that the case-by-case waivers for exceptional government employees (such as "without compensation" employees (WOCs)), provided in the Department of Energy Organization Act, are overly burdensome and too time-consuming to allow timely response to an immediate emergency and that further waiver authority must be established.

Common Cause recognizes that in times of national emergency, the President must be able to call on vitally important national resources to respond to the crisis. We also are aware that the the President, in times of emergency, has the responsibility to ensure that the national interests are protected.

However, we also believe that there must be a clear recognition of the potential for abuse. Part of the national interest is a government which guards against self-dealing by government employees and officials, and provides the governed with the assurance that government decisions are made on merit. It is in the national interest to ensure that government service is not a means of "cashing in".

In our view, a case has not been made demonstrating the need for this type of revision of conflict-of-interest statutes. Based on what we have seen to date, we believe that legislation in this area is neither necessary nor appropriate.

We are very concerned about the growing tendency to apply a cost-benefit analysis for ethics. This trend is dangerous, and

must not be used as an excuse for weakening standards simply because they are inconvenient.

We do recognize, Mr. Chairman, that you have sought to draft legislation which includes restrictions to try and safeguard against abuse. These restrictions in H.R. 3381 include:

- o prohibiting the President from delegating waiver authority;
- o limiting the waiver to an individual-by-individual basis as opposed to allowing waivers for classes of individuals;
- o limiting the waiver to a specific length of time (in this case, no more than 90 days with the ability to renew);
- o providing a government-wide procedure as compared to an agency-by-agency approach that may result in insufficient safeguards;
- o requiring written certifications to the Office of Government Ethics; and
- o attempting to clarify that this authority may only be used in an identifiable national emergency.

There are additional provisions that could be included that would provide further safeguards. These include:

1. Limiting to a specific number the individuals who may receive such a waiver. Such limits are included in section 18 USC 207(k)(1) and require that no more than 25 individuals may be granted waivers at any one time.

2. Strengthening section 1(f)(1)(B) to ensure that the individuals who receive a waiver not only offer services "critically needed for the benefit of the Federal Government" but that these services cannot be otherwise provided. Such an addition would ensure that the waiver is a "last resort" for an individual whose knowledge or expertise is irreplaceable.

3. Dropping section 1(f)(1)(C) to make clear that the use of a "cost-benefit" analysis of conflict-of-interest statutes is potentially dangerous and unacceptable. As currently written, this section would spell out in statutory language and enact into law a dangerous "balancing test" precedent.

4. Strengthening the certification provisions to ensure adequate public availability of waivers. Section 1(f)(3) should be rewritten to require the President to determine "that public availability of such certification would directly and irreparably jeopardize national security."

5. Clarifying the definition of an "emergency". The Subcommittee should ensure that an emergency is tightly and clearly defined so that it is not subject to abuse or that the waiver is used in inappropriate circumstances.

6. Requiring that written certification also be sent to Congress. Congressional authorities charged with overseeing conflict-of-interest statutes should be aware of how the waivers are being used in order to determine if the waiver is being used properly and as envisioned. Certainly, relying simply on publication in the Federal Register, while useful, is not sufficient.

7. Requiring that individuals receiving waivers under this legislation prepare reports on their otherwise prohibited activities. We note that section 207(k)(5) of title 18 requires persons granted a waiver under that section to prepare reports "stating whether the person has engaged in activities otherwise prohibited by this section for each six-month period ... and if so, what those activities were." We believe that, because the waiver places an individual in such an extraordinary situation, a similar report requirement should be added to H.R. 3381.

In conclusion, Mr. Chairman, we do not believe that the case has been made to warrant providing the executive branch with additional waiver authority from conflict-of-interest statutes. Too many times, we have seen abuses flow from actions taken under the cover of "national security" and we have seen too many efforts to undermine and weaken conflict-of-interest standards even in the highest offices in the land. The industrial sectors immediately interested in this bill wield enormous economic power. We continue to believe that in fact, during times of national emergency, there will be many Americans from all economic strata and positions in industry that will respond to the call of their country and not withhold their needed expertise or knowledge because of the conflict-of-interest rules that currently exist to protect the public.

Thank you, Mr. Chairman, for this opportunity to testify.

Mr. FRANK. I appreciate that. But it sounds like your objection is not so much to the principle of waiver authority under appropriate circumstances. Do you feel the legislation that I have here—I don't take it personally because I haven't even read it yet, so I can't take pride of authorship—but is it your sense that we're opening up too many loopholes? In other words, if you agree, as you just did, that there should be some waiver authority in some circumstances, what damage would be done by perhaps making it a little more efficient?

Ms. McBRIDE. Mr. Chairman, I think the Congress legislates when there is a need to add additional authority. We simply don't think the case has been made to do that, and we—

Mr. FRANK. Let me ask you, what harm is there in broadening the waiver authority? I must say, when people say it's just redundancy, I want to get a little beyond that. If you're saying the waiver authority already exists, that's one thing. But do you think the legislation we have under consideration would extend the waiver authority substantively in ways that would be damaging?

Ms. McBRIDE. Yes, we think it does extend the waiver authority, and we think you've added some safeguards. There are a number of other things that we think should be added to your bill if this committee is going to go forward with it.

Mr. FRANK. I would be glad to look at that. We do seem to have some agreement on the waiver side.

You cited some circumstances currently in the law. I don't remember in the legislation whether some such circumstance has to be referenced in granting the authority. Is that the sort of thing you're talking about?

Ms. McBRIDE. I'm sorry, would you repeat that?

Mr. FRANK. You cited in the law grounds in which waivers can now be given—

Ms. McBRIDE. And that are already there and available. We think to then grant additional authority is not needed. I'm sorry.

Mr. FRANK. You mean without reference to a particular cause? Is that the issue, that you think we're giving a blanket authority without the need to reference one of those conditions?

Ms. McBRIDE. Well, I think that the authority exists, Mr. Chairman, and I think it is possible that when you look at conflict of interest laws, which are passed to protect the public interest, there should be—when we come in and propose conflict of interest laws, we are asked by this committee and others what is the record, what is the need. We are asked that and we are asked to provide a record. We went through this question recently on the honoraria issue. I think that the same kind of standard should exist for providing exceptions or—

Mr. FRANK. I agree. But, Ms. McBride, you remember, while I was asking that on the honoraria issue, you and I were on the same side when they were asking us on the post-employment issue.

Ms. McBRIDE. We felt there was a record.

Mr. FRANK. I understand that point. But the question is whether there is a substantive enlargement of the waiver authority that we're talking about here.

You said there is already waiver authority, and I understand your general point. But I would ask you—and you can do it later in

writing—to show me how what we're talking about today would substantively enlarge that waiver authority beyond the authority you've cited.

Ms. McBRIDE. We can send it. But again, we don't think this is necessary and we don't think it's appropriate. We just want to be clearly on the record on that.

Mr. FRANK. I appreciate that.

Let me say to Mr. Fygi, if you would also like to address that, either of you, in writing, as to why you think the existing waiver authority doesn't go far enough—in writing, I said, Mr. Fygi.

Did you want to address it right now?

Mr. FYGI. I would merely say that our experience in the last emergency really crystallized in Admiral Watkins' mind the need for additional authority here. We will be happy to explain that further in writing.

Mr. FRANK. Good. I appreciate that. We have now focused on this point.

Let me say that two points have come up. One is the other waiver in the post-employment law, which you objected to. I am persuaded by you that we ought to address that separately. My inclination would be—I may still disagree with you on it—

Mr. FYGI. That's fair enough. We just wanted the opportunity to make our case.

Mr. FRANK. I do agree that should be looked at separately. I just want to reassure you that I was listening to you while I was talking to Mr. Dye.

Mr. FYGI. Thank you.

Mr. FRANK. And the other issue that Ms. McBride raised, this is a serious issue. I would ask both of you to address further the question of to what extent this bill would expand existing waiver authority and why that is or is not a good idea.

Mr. Schiff, any questions?

Mr. SCHIFF. No, Mr. Chairman.

Mr. FRANK. Mr. Edwards.

Mr. EDWARDS. No questions.

Mr. FRANK. I thank you both. As brief as it is, I think this hearing has focused on the issue that we need to look at. We will take your written responses, and I would ask you to do it quickly, because we have promised to move quickly, one way or the other, on this bill. So if you could do that within 1 week, I would appreciate it. It would be our intention then within a week after receiving your information to mark this bill up.

Mr. FYGI. We will spare no effort.

Mr. FRANK. Thank you. The hearing is adjourned.

[Whereupon, at 11:25 p.m., the subcommittee adjourned, to reconvene subject to the call of the Chair.]

APPENDIXES

APPENDIX 1.—LETTER TO CHAIRMAN BARNEY FRANK FROM COMMON CAUSE, DATED OCTOBER 11, 1991

Common Cause

2030 M STREET, NW • WASHINGTON, D.C. 20036 • PHONE: (202) 833-1200 • FAX: (202) 659-3716

ARCHIBALD COX
Chairman

FRED WERTHEIMER
President

JOHN W. GARDNER
Founding Chairman

October 11, 1991

The Honorable Barney Frank
Chair, Subcommittee on Administrative Law and
Governmental Relations
House Judiciary Committee
Washington, DC 20515

Dear Chairman Frank:

I am writing to provide additional comments on H.R. 3381, proposed legislation to give the President non-delegable authority in emergency situations to waive conflict-of-interest statutes found in sections 203, 205, 207, 208 or 209 of title 18 United States Code. At the October 3 hearing, you requested our comments regarding existing waiver authority of conflict-of-interest laws, and why we believe this additional waiver authority is unnecessary.

We do not believe that a case has been made demonstrating the need for this additional waiver authority and that the burden rests with the proponents to demonstrate such a need.

In the past, Mr. Chairman, when proposals have been made to strengthen ethics laws, those drafting the laws have demanded demonstrable evidence of problems or abuses. We have responded, for example, in the areas of honoraria or the revolving door, with a pattern of clear abuse, potential and real conflicts of interest, and serious violations of the appearance standard. We believe that efforts to weaken ethics law should, at a minimum, meet the same test.

Even after the Subcommittee hearings, no case has been made demonstrating that the Persian Gulf war effort and its outcome were affected by the absence of the waiver authority proposed in H.R. 3381. The best case that the Department of Energy (DOE) could put forth in its testimony is that during the war, Secretary Watkins had to use "alternate means" to get the information he wanted. This hardly seems a case for the establishment of a new waiver system.

Common Cause recognizes that in times of national emergency, the President must be able to call on vitally important national resources to respond to the crisis, and that he has the responsibility to ensure that the national interests are protected. We believe that mechanisms currently exist to enable the President to obtain help from the those in the private sector and to obtain needed information.

For example, a January 23, 1991 report from the National Petroleum Council describes several mechanisms that were used with success following the Iraqi invasion of Kuwait which enabled the federal government to obtain essential information and expertise from the energy sector. The report describes "Company Emergency Contacts", key individuals designated by their companies who were in informal contact with officials of the Department of Energy. It also explains the "Executive Advisory Group", where a small group of key energy industry officials were called together to give their assessments of the situation and to make recommendations "after the Iraqi invasion of Kuwait."

In addition to these kinds of mechanisms to obtain industry information, input and advice, other mechanisms exist to allow those needed to help in times of national emergency to function inside government. We continue to believe that in fact, during times of national emergency, there will be many Americans from all economic strata and positions in industry that will respond to the call of their country and not withhold their needed expertise or knowledge because of the conflict-of-interest rules that currently exist to protect the public. But, if needed, more than sufficient waiver authority exists to bring key people into government as special government employees (SGEs) or without compensation employees (WOCs). In fact, after examining the existing waiver authority, we believe your Subcommittee should conduct oversight hearings on existing waiver authority to determine if the authority is overbroad.

The following describes the current conflict-of-interest statutes and the existing applicable waiver authority.

EXISTING WAIVER AUTHORITY FOR CONFLICT-OF-INTEREST STATUTES

Section 203. Compensation to Members of Congress, officers, and others in matters affecting the Government

This section deals with federal employees seeking or accepting any compensation for any representational services while employed by the U.S. Government in any matter to which the U.S. is a party. Special government employees may receive a waiver if the department head determines in writing that "the national interest so requires."

Section 205. Activities of officers and employees in claims against and other matters affecting the Government

This section deals with government employees acting as agent or attorney for prosecuting any claim against the United States or receiving any gratuity or share of any such claim. Again, special government employees may receive a waiver if the department head determines in writing that "the national interest so requires."

Section 207. Restrictions on former officers, employees, and elected officials of the executive and legislative branches

This section contains post-employment restrictions on representation. It contains both statutory exemptions and waivers. The one-year representation restriction on "certain senior personnel" may be waived for an individual with "special knowledge". It also may be waived if:

- the restriction would "create an undue hardship on the department or agency in obtaining qualified personnel to fill such position," and
- "granting the waiver would not create the potential for use of undue influence or unfair advantage."

Exceptions to the one-year ban also are included for individuals providing "scientific or technological information." Section 207(j)(5) states that the Director of the Office of Government Ethics (OGE) may make a written determination, published in the Federal Register, that the former officer or employee has "outstanding qualifications" and that "the national interest would be served by the participation of the former officer or employee." The one-year ban also applies only to officials serving at least 60 days and at high rates of pay.

Section 207(k) allows the President to grant a waiver to up to 25 individuals working at government-owned, contractor-operated entities (such as Sandia or Livermore Laboratories) from any part of the section if:

- "it is in the public interest," and
- "the services of the officer or employee are critically needed for the benefit of the Federal Government."

Section 208. Acts affecting a personal financial interest

This section deals with a federal employee participating personally and substantially in matters in which he or she has a financial interest. Under the case-by-case waiver authority, section 208 strictures on participating in a matter in which an individual has a personal financial interest (which can lead to the most burdensome action -- divestment), may be waived if:

- the government official responsible for the appointment makes a written determination that the potential conflict

-4-

"is not so substantial as to be deemed likely to affect the integrity of the services which the Government may expect from such officer or employee,"
 -- the government official responsible for an individual's appointment to an advisory committee determines that "the need for the individual's services outweighs the potential for a conflict of interest created by the financial interest involved," and
 -- the Director of OGE determines by regulation that the financial interest is "too remote or too inconsequential to affect the integrity of the services" of the individual.

Section 209. Salary of government officials and employees payable only by United States

This section prohibits supplementation of salary from anyone other than the United States government. It provides an explicit statutory exemption for SGEs and WOCs.

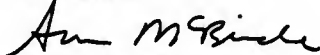
This review of existing waiver authority makes clear that, if a national emergency were to occur again, current law provides adequate means of obtaining essential information from economic sectors and key individuals. First, they can be called on as advisers or outside experts through such mechanisms as the "Company Emergency Contacts" or the "Executive Advisory Group". Second, if the government believed it necessary, certain individuals could be brought into government as special government employees or without compensation employees and utilize existing waiver authority explained above.

At issue in the effort to establish a new waiver system for conflict-of-interest rules does not seem to be whether or not essential information or expertise can be obtained by the President but, instead, whether a specific proposal for new waiver authority for the National Defense Executive Reserve (NDEs) offered by the National Petroleum Council and supported by DOE, can be implemented. As they envision, these reservists from the oil industry, trained in advance, would be "available for activation to full-time government service to assist in managing oil supplies during a severe national emergency." The Department of Energy has asserted that these individuals were unwilling to come into government during the Gulf War because of conflict-of-interest rules. Yet, DOE refuses to disclose who these reservists are or might be.

Creating a class of full-time employees who are making decisions affecting their company's and perhaps their own financial interests, yet are exempt from conflict-of-interest rules is dangerous on its face and simply not needed. The goal of the government is to obtain needed information and expertise in times of crisis. We do not believe proponents of the additional waiver authority have shown that current law prevents getting this information or harms the national interest.

Again, we emphasize our strong belief that part of the national interest is a government which guards against self-dealing by government employees and officials, and provides the governed with the assurance that government decisions are made on merit. Given the surfeit of existing waiver authority in current statutes, the lack of a compelling case by proponents and the enormous potential for serious conflicts of interest, we strongly urge the Subcommittee to defer action on H.R. 3381 and instead to review existing waiver authority.

Sincerely,

A handwritten signature in dark ink, appearing to read "Ann McBride". The signature is fluid and cursive, with the first name "Ann" and last name "McBride" clearly distinguishable.

Ann McBride
Senior Vice President

APPENDIX 2.—LETTER TO CHAIRMAN BARNEY FRANK FROM THE
SECRETARY OF ENERGY, DATED OCTOBER 23, 1991



The Secretary of Energy
Washington, DC 20585

October 23, 1991

The Honorable Barney Frank
Chairman, Subcommittee on
Administrative Law and
Governmental Relations
Committee on the Judiciary
U.S. House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman:

At the conclusion of your October 3, 1991, hearing on legislation to provide the President emergency authority to waive certain conflict of interest laws, you invited the witnesses to comment on the need for such authority.

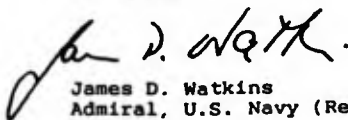
In my own experience during the Persian Gulf War, we were unable to activate the petroleum industry National Defense Executive Reserve provided for by the Defense Production Act of 1950. I had originally contemplated using this structure to obtain and apply current petroleum industry expertise to this Department's efforts in responding to Iraq's invasion of Kuwait. This I was unable to do, most significantly because the implications of the conflict of interest laws on individual reservists' actions to help the Government in an emergency were seen by the petroleum industry and its executives as incompatible with rendering sincere and well-intentioned advice on subjects that might be unanticipated and require prompt action. In short, the prospect of having their emergency actions faulted in hindsight for potential criminal wrongdoing deterred these individuals from participating in the fashion contemplated by the Defense Production Act.

It is true that the war was prosecuted successfully without the petroleum industry reservists. We were able to improvise alternate means to acquire some of the needed expertise. Had the dimensions of the conflict resulted in additional problems, however, they

very likely would have overtaxed the limited means available to us to acquire and apply the necessary types of industry expertise.

It would have been most valuable to me as Secretary of Energy to have had at my disposal a means of tapping into current petroleum industry expertise in dealing with these events. This experience indicates vividly to me the need for and great potential value of emergency waiver authority such as that proposed by the Administration and which your Subcommittee is actively considering.

Sincerely,

A handwritten signature in dark ink, appearing to read "J. D. Watkins". The signature is fluid and cursive, with a large initial "J" and a stylized "W".

James D. Watkins
Admiral, U.S. Navy (Retired)

○

ISBN 0-16-938386-2

125 93

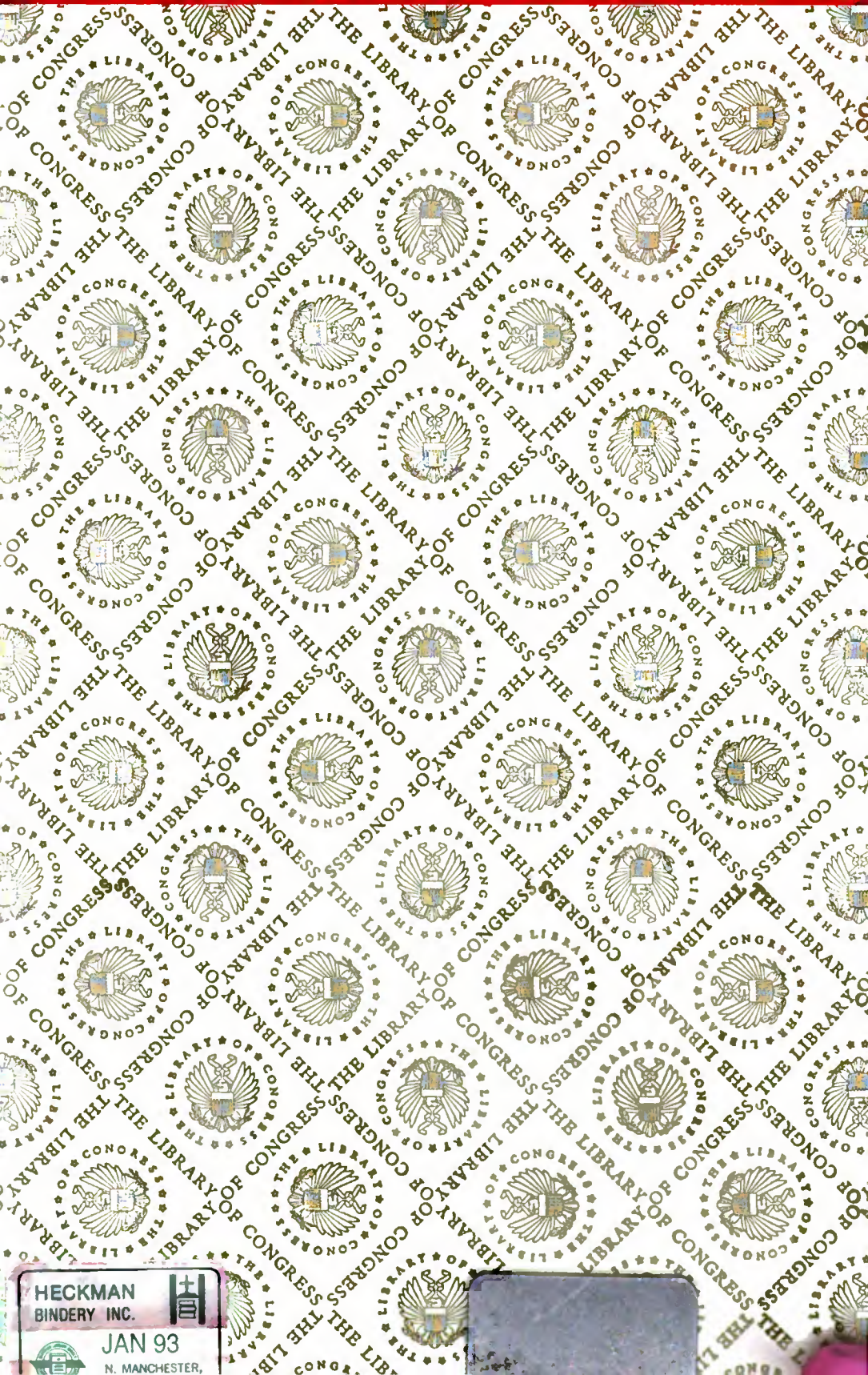
90000



9 780160 383861







HECKMAN
BINDERY INC.



JAN 93

N. MANCHESTER,



LIBRARY OF CONGRESS



0 018 387 647 8